Supreme Court, U.S.
FILED
DEC 21
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-388

In The

Supreme Court of the United States

October Term, 1990

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,

Petitioners,

v.

DOMINGO CASTRO ALFARO, ET AL.,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. LIST OF ALL PARTIES

Petitioners, defendants below, are Dow Chemical Company ("Dow") and Shell Oil Company ("Shell"). Pursuant to Supreme Court Rule 28.1, a list of all of Dow's parents, subsidiaries, and affiliates was attached to the Petition for Writ of Certiorari as Appendix 10, at App. 108-13. A list of Shell's parents, subsidiaries, and affiliates was attached to the Petition for Writ of Certiorari as Appendix 11, at App. 114-20. Respondents, plaintiffs below, are thirty-five Costa Rican nationals. A list of all respondents was attached to the Petition for Writ of Certiorari as Appendix 9, at App. 121.

II. TABLE OF CONTENTS

Page

I. LIST OF ALL PARTIES i

II. TABLE OF CONTENTS ii

III. TABLE OF AUTHORITIES iii

IV. REPLY ARGUMENT 1

1. PETITIONERS TIMELY RAISED THEIR FEDERAL DUE PROCESS CLAIM IN THE TEXAS COURTS 1

2. THE RECORD BELOW CONTAINS SUBSTANTIAL EVIDENCE OF THE DISCOVERY AND TRIAL PROBLEMS WHICH WOULD OPERATE TO DENY PETITIONERS DUE PROCESS OF LAW 5

III. TABLE OF AUTHORITIES

Page

CASES

Alfaro v. Dow Chemical, 751 S.W.2d 208 (Tex. App. – Houston [1st Dist.] 1988) 2, 3

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 5

Dow Chemical v. Alfaro, 786 S.W.2d 674 (Tex. 1990) ... 3, 4

Hawthorne v. Lovorn, 457 U.S. 255 (1982) 5

STATUTES

§ 71.031 of the Texas Civil Practice and Remedies Code 2

OTHER AUTHORITIES

44 Fed. Reg. 65135 (Nov. 9, 1979) 6

50 Fed. Reg. 46512 (Nov. 8, 1985) 6

IV. REPLY ARGUMENT

1. PETITIONERS TIMELY RAISED THEIR FEDERAL DUE PROCESS CLAIM IN THE TEXAS COURTS.

Respondents' assertions that the federal due process question was not timely raised below are contradicted by the undisputed procedural history of this case. In fact, the federal due process argument that petitioners ask this Court to review was raised before *before the Texas trial court*, the Texas Court of Appeals, and the Supreme Court of Texas. Indeed, this claim was raised before *every* Texas court petitioners appeared before. Even under respondent's authorities, no more is required.

In addition to being timely raised below, petitioners' federal due process argument was expressly considered by one Justice of the Texas Court of Appeals and two Justices of the Texas Supreme Court. Under well-established precedent of this Court, this is plainly sufficient to preserve this claim for review in this Court.

The due process argument that petitioners ask this Court to review was presented to the 61st Judicial District Court of Harris County, Texas on March 3, 1987, in petitioner Shell Oil Company's Renewed Motion for Dismissal Without Prejudice on Grounds of Forum Non Conveniens. Relevant portions of this motion are reproduced as Supplemental Appendix 1, at S. App. 1-3 (Tr. 197-207). This motion expressly presented the following argument to the Texas trial court:

> The Due Process Clause of the Fifth Amendment is "essentially a recognition of the principals of justice and fundamental fairness in a given set of circumstances." It would be fundamentally unfair to allow this matter to proceed any further in Texas.

S. App. at 1 (Tr. 206) (citation omitted). This motion went on to expressly present the arguments made to this Court that the unequal ability of the petitioners to obtain crucial evidence from Costa Rica, while respondents would have all of the advantages of civil discovery Texas, would operate to deprive petitioners of due process of law. *See* S. App. at 1-3 (Tr. 206-07). The Texas trial court, however, dismissed this action on the grounds of forum non conveniens, and did not need to reach petitioners' federal due process arguments. The unpublished order of the 61st Judicial District Court of Harris County, Texas, dated June 22, 1987, dismissing this action on the basis of forum non conveniens was reproduced as Appendix 3, at App. 99-101.

After the trial court granted petitioners' motion to dismiss on the ground of forum non conveniens, respondents appealed the order of dismissal to the Court of Appeals for the First Supreme Judicial District of Texas at Houston, the intermediate state appellate court. Since the trial court's order of dismissal was based on the doctrine of forum non conveniens, the initial briefing to the Texas Court of Appeals was directed solely to that issue. The three-judge panel of the Court of Appeals held, with one judge dissenting, that section 71.031 of the Texas Civil Practice and Remedies Code and its statutory predecessors had abolished the common-law doctrine of forum non conveniens in Texas. The decision of the First Court of Appeals is styled *Alfaro v. Dow Chemical*, 751 S.W.2d 208 (Tex. App. – Houston [1st Dist.] 1988), and was reproduced as Appendix 2, at App. 89-98.

The majority opinion of the Court of Appeals did not address the federal due process issue. *See* 751 S.W.2d at 208-11; Appendix 2, at App. 89-97. However, in dissent,

Justice Duggan of the Texas Court of Appeals argued that the majority's decision would subject § 71.031 to "well-deserved due process attacks." *See* 751 S.W.2d at 211; Appendix 2 at App. 97.

After the decision of the majority of the Court of appeals panel holding that forum non conveniens was no longer available in Texas, petitioners renewed their federal due process arguments in their motions for rehearing before the Court of Appeals. Relevant portions of Dow's motion for rehearing were reproduced as Appendix 10, at App. 122-26. Relevant portions of Shell's motion for rehearing were reproduced as Appendix 11, at App. 127-31. The Texas Court of Appeals overruled petitioners' motion for rehearing without issuing an opinion, thereby implicitly rejecting petitioners' due process arguments.

Petitioners appealed to the Supreme Court of Texas by filing separate applications for writ of error with that court on July 18, 1988. Petitioners again raised the federal due process argument in their applications for writ of error to the Supreme Court of Texas. Relevant portions of Dow's application for writ of error were reproduced as Appendix 12, at App. 132-35. Relevant portions of Shell's application for writ of error were reproduced as Appendix 14, at App. 136-39.

The Supreme Court of Texas, with four justices dissenting, affirmed the decision of the First Court of Appeals that the common law doctrine of forum non conveniens had been abolished in Texas. The Texas Supreme Court's decision is styled *Dow Chemical v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), and was reproduced as Appendix 1, at App. 1-88.

Despite the fact that a substantial portion of petitioners' applications for writ of error were devoted to the federal question that petitioners seek to bring before this Court, the majority opinion of the Supreme Court of Texas failed to address petitioners' due process arguments. *See* 786 S.W.2d at 674-79; Appendix 1, at App. 1-12. However, the concurring opinion of one Justice of the Supreme Court of Texas addressed petitioners' federal due process claim, albeit in terms of minimum contacts. *See* 786 S.W.2d at 685 n.8; Appendix 1, at App. 28-30 (Doggett, J., concurring).

Another Justice of the Texas Supreme Court, in a dissenting opinion, argued at length that the decision of the majority of the Texas Supreme Court "allows assertions of personal jurisdiction by Texas courts that are so unfair and unreasonable as to violate the due process clause of the federal constitution." 786 S.W.2d at 697; Appendix 1, at App. 60 (Cook, J., dissenting).

Petitioners timely requested rehearing before the Texas Supreme Court, and again raised the federal question sought to be reviewed in their joint motion for rehearing before the Supreme Court of Texas. Relevant portions of this motion were reproduced as Appendix 14, at App. 140-48. The order denying petitioners' motion for rehearing did not address the federal question raised by petitioners. *See* Appendix 4, at App. 102-04.

Contrary to respondent' assertions, therefore, the federal due process claim that petitioners seek to have this Court review were raised at *every possible stage* of the proceedings before the Texas courts. These arguments were made (1) before the 61st Judicial District Court of Harris County, (2) before the Texas Court of Appeals for the First Supreme Judicial District, and (3) before the

Supreme Court of Texas. In addition, petitioners' federal due process arguments were expressly considered by one Justice of the Texas Court of Appeals (Duggan, J., dissenting) and by two Justices of the Supreme Court of Texas (Doggett, J., concurring, and Cook, J., dissenting).

No more is required under this Court's precedents. Indeed, well-established precedent from this Court makes it clear that far less will suffice to present a constitutional issue to the State courts for review.

For example, in *Hawthorne v. Lovorn*, 457 U.S. 255, 262-65 (1982), this Court held that raising an argument for the first time in petition for rehearing to the Mississippi Supreme Court was sufficient to preserve review when the Mississippi Supreme Court occasionally considered arguments raised for the first time in a petition for rehearing. *See also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (stating that if petitioner had raised constitutional claims in the Mississippi Supreme Court in a motion for rehearing this would have been sufficient). Petitioners here did far more than required by this Court's precedents to have effectively presented their constitutional claims to the Texas courts. Review of these claims in this Court is plainly proper.

2. THE RECORD BELOW CONTAINS SUBSTANTIAL EVIDENCE OF THE DISCOVERY AND TRIAL PROBLEMS WHICH WOULD OPERATE TO DENY PETITIONERS DUE PROCESS OF LAW.

The record below establishes that the inability of Dow and Shell to join proper third parties or to do necessary discovery fundamental to their defense puts them at a distinct and severe disadvantage in comparison to respondents, who will be able to selectively produce

and rely upon evidence from Costa Rica and also have the benefit of full discovery from petitioners under the Texas Rules of Civil Procedure. Contrary to respondents' assertions, petitioners offered a substantial amount of evidence to the Texas courts concerning the distinct disadvantage relative to respondents that petitioners would be in if this case is tried in Texas.[1]

For example, on June 26, 1984, petitioner Dow submitted the affidavit of Ronald L. Davis to the trial court. Mr. Davis' affidavit is reproduced as Supplemental

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[1] Respondents brief is so replete with misstatements of fact and statements unsupported by the record in this case that petitioners cannot possibly respond to all of them in the limited space permitted here. For example, respondents' assertion that petitioners continued to ship DBCP to Costa Rica after it was banned in the United States is patently false.

Shell made no sales of DBCP product to Standard Fruit after 1970 and those sales have never been traced to Costa Rica. TR. 86-89. Dow stopped shipping to Standard Fruit sometime prior to November, 1978. TR. 23, 31, and 96.

The United States EPA permitted use of DBCP in the United States on many crops, including bananas, until October 29, 1979, when it limited use of DBCP in the United States to the Hawaiian Islands for use on pineapples. *See* 44 Fed. Reg. 65135 at 65169 (Nov. 9, 1979). The EPA banned any use of DBCP in the United States on October 23, 1985. *See* 50 Fed. Reg. 46512 (Nov. 8, 1985).

The Costa Rican government apparently banned or limited the use of DBCP on crops, including banana crops, in December, 1978, a full year before *more limited* action was taken in the United States. Affidavit of Dr. Carlos E. Dominguez, Tr. 550-551. The evidence is clear that at the time of the sale of their DBCP product neither Shell nor Dow were "dumping" pesticides banned for use in the United States in Costa Rica as their sales of DBCP to Standard Fruit Company ended before the Costa Rican government prohibited use of DBCP in Costa Rica in December, 1978.

Appendix 2 at S. App. 4-9 (Tr. 8-12). In his affidavit, Mr. Davis set forth in detail the Costa Rican residents that Dow would interview and possibly depose who were outside the compulsory process jurisdiction of the Texas trial court. S. App. 6-7 (Tr. 9-10). Mr. Davis also stated that Dow would want to depose Costa Rican doctors and hospital staff, who were also outside the scope of the Texas court's process. S. App. 7 (Tr. 10).

Similarly, petitioner Shell submitted an affidavit of Burt Ballanfant setting forth the discovery that Shell would be unable to take in Costa Rica, including discovery concerning the respondents' medical records, supervisors, fellow employees, employees of third companies, doctors, and family members. A copy of Mr. Ballanfant's affidavit is reproduced as Supplemental Appendix 3 at S. App. 10-14 (Tr. 13-16).

Petitioners also submitted evidence to the Texas trial court of specific difficulties that they had encountered in attempting to obtain basic information that respondents had ready access to. For example, Shell submitted an affidavit of Burt Ballanfant, who described his unsuccessful attempt to obtain an affidavit from one of respondents' treating physicians, Dr. Rosabal Guevara. A copy of Mr. Ballanfant's affidavit is reproduced as Supplemental Appendix 4 at S. App. 15-16 (Tr. 782). Respondents, however, were successful in obtaining an affidavit of Dr. Guevara, which was favorable to their position. A copy of Dr. Guevara's affidavit is reproduced as Supplemental Appendix 5 at S. App. 17-18 (Tr. 328-29). Of course, Shell cannot depose Dr. Guevara concerning his affidavit.

In addition, petitioners submitted the affidavit of Jose A. Berlanga who described a one-year effort to

obtain basic information from the Costa Rican government concerning the filing of workers compensation claims by the respondents. Mr. Berlanga's affidavit is reproduced as Supplemental Appendix 6 at S. App. 19-21 (Tr. 328-29). The meager information obtained from the Costa Rican government after a year of effort is reproduced as Supplemental Appendix 7 at S. App. 22-24 (Tr. 382-84).

Petitioners also offered evidence that their defense would be impaired because they would be unable to join third-parties who are not subject to the jurisdiction of the Texas trial court. Affidavit evidence on this issue was submitted to the trial court. *See* Affidavit of Ronald L. Davis, Supplemental Appendix 2 at S. App. 8 (Tr. 11); Affidavit of Burt Ballanfant, Supplemental Appendix 3 at S. App. 13 (Tr. 15). In addition to the respondents' employer, petitioners offered evidence to the trial court that they might need to implead other Costa Rican parties. In an affidavit, Jane M. Gootee, a Dow lawyer, stated that Dow might want to bring the designers, sellers, and maintainers of the injector device that the respondents allegedly used to apply DBCP and any Costa Rican repackagers of the DBCP into the action as third-party defendants. Ms. Gootee's affidavit is reproduced as Supplemental Appendix 8 at S. App. 25-33 (Tr. 712-19).

In short, the evidence before the trial court amply demonstrates that petitioners will be denied access to sources of proof essential to their defense. Respondents all but admit in their response that not all of the respondents' treating doctors will be available for examination by Dow and Shell, but argue that producing the respondents for medical examination under the Texas Rules of Civil Procedure somehow cures this problem. Response

at 8 ("most" of respondents' treating physicians will appear in Houston). It goes without saying that a medical examination in Houston years after the respondents' alleged exposure is an extremely poor substitute for being able to question and obtain the records of the physicians who treated the respondents for their alleged injuries many years ago. In these types of cases in particular, the chronological development of the respondents' alleged infertility problem is vital to determining the issue of causation, and can be established only through a complete review of *all* medical records and interviews with all treating doctors. In addition, for any respondents claiming only temporary or past injuries or effects, a future medical examination is no substitute at all for medical records and testimony of treating doctors.

Similarly, respondents concede in their response that all of the respondents' medical records will be not produced, and attempt to argue that since respondents have the burden of proof, this is their problem, not Dow's and Shell's. Response at 8-9. This argument assumes that these medical records will be favorable to respondents, and will support respondents' theory that Dow and Shell caused their alleged injuries. However, if the respondents' Costa Rican medical records are not favorable to their claims, such records are obviously crucial to Dow and Shell's defense. Again, the respondents merely offer the inadequate remedy of an independent medical examination in Houston, years after the alleged onset of the respondents' injuries.

The evidence presented to the trial court establishes that the sum of these disadvantages will operate to deprive petitioners of due process of law. To prevent this

Constitutional violation, petitioners Dow Chemical Company and Shell Oil Company request that the Court grant their petition for writ of certiorari and, after full briefing and argument, issue a final decision reversing the judgment of the Supreme Court of Texas in this case.

Respectfully submitted,

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Counsel for Petitioner
Shell Oil Company

SUPPLEMENTAL APPENDIX 1

Shell's Renewed Motion For Dismissal Filed On March 3, 1987

[Transcript pp. 197-208]

DEFENDANT SHELL OIL COMPANY'S RENEWED MOTION FOR DISMISSAL WITHOUT PREJUDICE ON GROUNDS OF FORUM NON CONVENIENS, FILED: MARCH 3, 1987, RAY HARDY, District Clerk, Harris County, Texas. BY: M. Flores, Deputy.

NO. 84-17171

DOMINGO CASTRO ALFARO, ET AL.,	§	IN THE DISTRICT COURT
	§	FOR THE COUNTY OF
Plaintiffs,	§	HARRIS, TEXAS
	§	
vs.	§	61ST JUDICIAL DISTRICT
	§	
DOW CHEMICAL COMPANY, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT SHELL OIL COMPANY'S RENEWED MOTION FOR DISMISSAL WITHOUT PREJUDICE ON GROUNDS OF FORUM NON CONVENIENS

* * *

The Due Process Clause of the Fifth Amendment is "essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances". *Honeywell Inc. v. Metz Apparatewerke*, (7th Cir. 1975) 509 F.2d 1137, 1143. It would be fundamentally unfair to allow this matter to proceed any further in Texas.

Defendants' constitutional rights would be violated during the discovery phase of this action. While plaintiffs

would have the full authority of this Court with which to compel discovery and enforce discovery obligations, defendants would have no such authority backing their efforts to discover information which is known to Costa Rican witnesses or contained in documents located in Costa Rica. Thus, it is not inconceivable that defendants would find it virtually impossible to investigate and prepare their defense of this matter while plaintiffs would be able to compel complete disclosure of all relevant information in defendant's possession. As an example of the unfairness of this situation, the discovery and investigation conducted in this case to date shows that while plaintiffs initially denied that they had filed a workers compensation claim in Costa Rica, the records of the Costa Rican Instituto Nacional de Seguros (INS) reflected that such claims had actually been filed. An affidavit which took almost one full year to obtain. (Affidavit of Jose Berlanga, attached hereto as Exhibit K.)

Similarly, defendant's constitutional rights would be violated during the trial of this action. While plaintiffs would be free to subpoena witnesses and documents for trial, defendants would have no means of compelling the attendance of witnesses or documents located in Costa Rica. It is thus highly possible that defendants would be unable to mount a full defense in this matter. It was this apparent inequity which caused the Illinois appellate court to reverse a six month trial on the basis of forum non conveniens. *Lowe v. Norfold and Western Ry. Co.*, 463 N.E. 2d 792 (Ill. App. Ct. – 1984).

CONCLUSION

The discovery taken in this case, the precedent of two cases *identical* to this case, and the total lack of connection of Harris County to this litigation mandates that this Court should dismiss this case without prejudice to its being refiled in Costa Rica on the basis of forum non conveniens.

Respectfully submitted,

/s/ Burt Ballanfant
Burt Ballanfant
State Bar No. 01647000
4794 One Shell Plaza
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Houston, Texas 77001

Jose' A. Berlanga
State Bar No. 02203400
4708 One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

ATTORNEYS FOR DEFENDANT
SHELL OIL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Shell Oil Company's Renewed Motion for Dismissal Without Prejudice on Ground of Forum Non Conveniens has been served upon attorneys of record in this case, by mailing certified return receipt requested on this 3rd day of March, 1987.

/s/ Burt Ballanfant
Burt Ballanfant

SUPPLEMENTAL APPENDIX 2

Affidavit In Support Of
Dow's Motion To Dismiss
Filed On June 26, 1984

[Transcript pp. 8-12]

DOW AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, SERVED JUNE 21, 1984, FILED: JUNE 26, 1984, RAY HARDY, District Clerk, Harris County, BY Moore, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOMINGO CASTRO ALFARO, et al.	§	
v.	§	C.A. No. H-84-2249
THE DOW CHEMICAL CO., et al.	§	FILED JUN 26 1984

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

COMES NOW The Dow Chemical Company and in support of the Motion to Dismiss filed herein by Shell Oil Company and The Dow Chemical Company submits the attached affidavit in support of said motion. The Motion to Dismiss has been set for hearing by the Court on August 8, 1984.

Respectfully submitted,

/s/ F. Walter Conrad
F. Walter Conrad

OF COUNSEL:

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1230

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of June, 1984 a true and correct copy of the foregoing was served on counsel for plaintiff by certified mail, return receipt requested, and on all other counsel of record by regular mail.

/s/ F. Walter Conrad
F. Walter Conrad

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

DOMINGO CASTRO ALFARO, ET AL.

Plaintiffs,

vs.

THE DOW CHEMICAL COMPANY, SHELL OIL COMPANY AND AMVAC CHEMICAL CORPORATION,

Defendants.

Case No. 842249

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

The State of Michigan, County of Midland, Ronald L. Davis, upon his oath, hereby deposes and says:

1. That I am the Manager of Claims and Litigation Section of the Legal Department of The Dow Chemical Company, one of the defendants in the above-captioned matter, and as such am fully familiar with the facts and circumstances as set forth below.

2. That this matter, if tried in the Southern District of Texas, would be extremely burdensome and inconvenient since, as Plaintiffs allege, Plaintiffs were exposed to the allegedly dangerous product while in the course of their employment in Costa Rica. In light of this fact, Defendant, The Dow Chemical Company, would need to locate and interview, in Costa Rica, the following:

(a) Plaintiff's employer.

(b) Agents of Plaintiff's employer responsible for supervision of the operation of the employer's plant.

(c) Agents or independent contractors of the employer responsible for the design and plan of the production line at which Plaintiffs were working when they were allegedly exposed to Defendant's product.

(d) Suppliers of Plaintiffs' employer.

(e) Co-employees of the Plaintiff.

(f) Those responsible for the maintenance and servicing of the Plaintiffs' place of employment.

(g) Others that might turn up in an investigation.

All of the above are outside the scope of compulsory process of the Southern District of Texas. Thus, conducting investigations and interviews of the above witnesses would be extremely burdensome or impossible.

3. That Defendant, The Dow Chemical Company, would want to view the scene of alleged exposure and investigate the records of the Plaintiffs' employer; and this would be burdensome or impossible since plaintiffs' employer is without the scope of compulsory process of this court.

4. That Defendant, The Dow Chemical Company, would want to depose doctors, and perhaps hospital staff with regard to the Plaintiffs' alleged injuries. Again, such people are without the scope of the process of this court.

5. That since the alleged exposure occurred in Costa Rica, any matters bearing on this case that investigation might turn up are likely to be in Costa Rica. Thus, every time Defendant, The Dow Chemical Company, might want to investigate an aspect of this case, it would be put

to great hardship since it would not have the benefit of compulsory court process. This would put Plaintiffs at an unfair advantage.

6. That Defendant, The Dow Chemical Company, would want to implead others as third-party defendants who might be liable in some degree for any recovery in this matter, such as Plaintiffs' employer; and that such parties are Costa Rican residents with no United States connection and thus not subject to process or jurisdiction in any United States district. If The Dow Chemical Company was to later sue these parties in a Costa Rican court, there is a clear danger of inconsistent verdicts.

7. That under the above circumstances, it would be extremely burdensome for The Dow Chemical Company to defend its action, if not impossible in some respects. Moreover, The Dow Chemical Company would not be able to implead potential third parties who may also be liable in some degree, and thus, The Dow Chemical Company would be subject to bearing a disproportionate amount of any judgment that might be rendered in this matter.

Wherefore, your deponent respectfully requests that the honorable court dismiss this action since a much more convenient and less burdensome alternative forum exists.

FURTHER AFFIANT SAITH NOT.

/s/ Ronald L. Davis
Ronald L. Davis
Manager of Claims and Litigation

STATE OF MICHIGAN)
) SS.
COUNTY OF MIDLAND)

Sworn to and subscribed before me this 23rd day of May, 1984.

/s/ Faye E. Yarnell
Notary Public
FAYE E. YARNELL
NOTARY PUBLIC, BAY COUNTY,
MICHIGAN ACTING IN
MIDLAND COUNTY
MY COMMISSION EXPIRES
JUNE 10, 1984

SUPPLEMENTAL APPENDIX 3

Affidavit In Support Of Shell's Motion To Dismiss Filed On July 18, 1984

[Transcript pp. 13-16]

SHELL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, FILED JULY 18, 1984, RAY HARDY, District Clerk, Harris County, Texas. BY: F. Moore, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOMINGO CASTRO ALFARO, et al.,	§	
Plaintiffs,	§	C.A. No.
v.	§	H-84-2249
SHELL OIL COMPANY, et al.,	§	Filed
Defendants.	§	JUL 18 1984

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

COMES NOW Shell Oil Company and in support of the Motion to Dismiss filed herein by Shell Oil Company submits the attached affidavit in support of said motion. The Motion to Dismiss has been set for hearing by the Court on August 8, 1984 and a Motion to Reset Hearing is pending before the Court.

Respectfully submitted,

/s/ Burt Ballanfant
Burt Ballanfant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Affidavit in Support of Motion to Dismiss has this day been delivered by Certified Mail, Return Receipt Requested, postage prepaid, to the attorney of record Mr. Russell W. Budd, Baron & Associates, 1050 Dallas Federal Savings Tower, Dallas, Texas 75225 and Mr. Clayton Devin, Cowles, Sorrells, Patterson & Thompson, One Main Place, Dallas, Texas 75250, and Mr. Walter Conrad, Baker & Botts, One Shell Plaza, Houston, Texas 77002 on this, the 16th day of July, 1984.

/s/ Burt Ballanfant
Burt Ballanfant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOMINGO CASTRO ALFARO,
ET AL.,

Plaintiffs,

vs.

DOW CHEMICAL CO., ET AL.,

Defendants.

CIVIL ACTION
NO.
H-84-2249

/

AFFIDAVIT

Comes now Burt Ballanfant and states under oath that he is an attorney licensed to practice law in the State of Texas since 1972 and is the attorney responsible for the conduct of Shell's defense in DBCP litigation and that he has been trial counsel for Shell in the only two cases involving DBCP litigated to a jury verdict.

Based upon my DBCP trial experience, knowledge of the medical and toxicological literature pertaining to DBCP, and the implications in plaintiffs' complaint as to the circumstances of their exposure it is my belief that among the pivotal issues in this litigation will be:

(1) the extent of plaintiffs' exposure as described by themselves, their co-workers and their supervisors;

(2) a complete medical and fertility history of both spouses since puberty;

(3) a comprehensive exploration of the plaintiffs' overall lifestyle;

(4) a full exploration of the industrial hygiene practices at the site of plaintiffs' employment including but not limited to use of protective equipment and of trained professionals in the area of industrial hygiene;

(5) bills of lading showing the source, time of receipt, and use of the product.

The witnesses and records pertaining to these issues such as medical records, supervisors, fellow employees, employees of third companies, doctors, and family members would probably reside in Costa Rica. Their susceptibility to compulsory process in the United States is nonexistent. The absence of their testimony would fundamentally prejudice the defense of these cases by Shell Oil Company.

Furthermore, a supplier manufacturer defendant such as Shell Oil Company would seriously consider third party actions for contribution, indemnity, and comparative fault against employers, unions, and possible intermediate processors all of whom are or probably are residents of Costa Rica and not susceptible to process in the United States.

/s/ Burt Ballanfant
Burt Ballanfant
Attorney for Shell Oil Company

Signed and sworn to before me by Burt Ballanfant on July 16, 1984, to certify which witness my hand and seal of office.

/s/ Jacqueline M. Wagner
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

JACQUELINE M. WAGNER
Notary Public in and for the State of Texas
My Commission Expires March 5, 1985

SUPPLEMENTAL APPENDIX 4

Affidavit Of Burt Ballanfant
In Support Of Shell's Motion
For Sanctions Filed April 21, 1987

[Transcript p. 782]

STATE OF TEXAS)
)
COUNTY OF HARRIS)

AFFIDAVIT OF BURT BALLANFANT

BEFORE ME, the undersigned authority, personally appeared Burt Ballanfant, who being by me duly sworn, deposed and said:

My name is Burt Ballanfant. I am currently employed as a litigation staff attorney by Shell Oil Company and have held this position since April, 1980. I was admitted to the State Bar of Texas in 1972, am a member in good standing and have never been the subject of any disciplinary action. One of my responsibilities as trial counsel for Shell Oil Company is supervision and conduct of litigation concerning Shell's DBCP product. In preparation for this litigation involving DBCP by these Costa Rican banana workers I attempted to obtain an affidavit from Dr. Rosabal Guevara which he refused to give.

/s/ Burt Ballanfant
Burt Ballanfant

SUBSCRIBED AND SWORN TO BEFORE ME on the 21st day of April, 1987, to certify which witness may [sic] hand and seal.

/s/ Kathleen W. Blackmor
Notary Public in and for
Harris County, Texas

My commission expires 6-23-90.

Exhibit A

SUPPLEMENTAL APPENDIX 5

Translation Of Affidavit Of Fernando Rosabal Guevara

Dated March 20, 1987

[Transcript p. 445]

No. 078529 C

SWORN AFFIDAVIT

The undersigned, FERNANDO ROSABAL GUEVARA, of legal age, divorced, resident of San José, ID No. two – one hundred seventy – four hundred ninety-seven, a surgeon and urology specialist, duly registered with the Costa Rican College of Physicians and Surgeons of Central America, hereby swear the following: 1. I performed professional services as a urology specialist for the Occupational Hazards Department of Costs Rican Nation 1 Insurance Institute, during which time I was assigned to examine all the patients employed by Standard Fruit Company that had been referred by the Costa Rican Social Security Clinic at Río Frío de Sarapiquí with a history of exposure to or contact with dibromochloropropane (DBCP) under the tradenames of Nemagón and Fumazone and low sperm counts. 2. I examined approximately 80 patients. 3. I obtained complete clinical histories and lab tests for each patient, including blood, toxicology, liver and kidney tests. 4. Since there can be several causes of sterility, I first suspected but later determined that these cases were not caused by alcoholism, congenital defects, impotence, smoking or drug abuse. 5. I did not come to a reasonable medical conclusion that these patients were suffering

from damage attributable to DBCP until nineteen hundred eighty-three. 6. I did not inform any of my patients about this conclusion until around the end of nineteen eighty-three. 7. Around the latter part of nineteen eighty-three, I informed these patients that their low sperm count could be due to any of several factors and that they might improve with treatment. 8. I did not arrive at a reasonable medical certainty that the oligospermia or azoospermia of these patients was irreversible and caused by DBCP until it became clear that these patients were suffering from Sertioli's syndrome, i.e., atrophy of the testicles. This was proved by biopsies of the testicles prior to final diagnosis. 9. At the conclusion of testing, these patients did not know the exact chemical causing their problems nor did a reasonable medical probability exist that a chemical used on the job was the cause of their problems. They did not know that the condition was irreversible, nor did they know the real medical cause. 10. I make these statements under oath and am therefore prepared to give testimony to the foregoing at any time in Houston, Texas, USA.

signed and sworn at 2 PM on this the twentieth day of March in the year nineteen hundred eighty-seven.

[Fernando Rosabal Guevara]

SUPPLEMENTAL APPENDIX 6

Affidavit Of Jose A. Berlanga
In Support Of Shell's Motion To Dismiss
Filed On March 3, 1987

[Transcript pp. 328-29)

EXHIBIT K

NO. 84-17171

DOMINGO CASTRO ALFARO, et al., Plaintiffs, v. DOW CHEMICAL COMPANY and SHELL OIL COMPANY Defendants.	§ § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 61ST JUDICIAL DISTRICT

STATE OF TEXAS)
)
COUNTY OF HARRIS)

AFFIDAVIT OF JOSE A BERLANGA

I, Jose A. Berlanga, being first duly sworn, depose and say as follows:

1. I am presently employed by the Shell Oil Company as a staff attorney in the Litigation Section of the Legal Department. I have held this position since October of 1982.

2. I am a member in good standing of the State Bar of Texas and have never been the subject of any disciplinary action. I was admitted to practice in the state of Texas in 1977. I am also eligible to practice before the Court of

Appeals for the Fifth Circuit and United States District Court of the Southern District of Texas.

3. I am co-counsel for the Shell Oil Company in the case of *Alfaro, et al. v. Dow Chemical Co., et al.* presently pending before the 61st Judicial District Court, Harris County, Texas.

4. After Shell filed its initial discovery request on November 14, 1985, seeking information related to the knowledge of the plaintiffs as to their cause of action, I received and reviewed their answers which I determined to be non-responsive.

5. I therefore initiated attempts to obtain the same basic information from the Costa Rican government.

6. The information reflected in the Affidavit of Jorge Hernandez Ramirez reflects almost a full year of effort which included one (1) trip to Costa Rica.

7. The delay and difficulty encountered merely to obtain basic information related to the filing of workers compensation claims from the plaintiffs and foreign governmental agencies demonstrates the fundamental prejudice to Shell's ability to prepare and present a defense in this forum.

Further Deponent sayeth not.

/s/ José A. Berlanga

SWORN AND SUBSCRIBED TO before me this 12th day of February, 1987.

/s/ Debra E. Walker
Notary Public for the
State of Texas

My commission expires
10/9/89

SUPPLEMENTAL APPENDIX 7

Translation Of Affidavit Of Jorge Hernandez Ramirez

Dated September 16, 1986

[Transcript pp. 382-84]

PAGE 1
NO. 160698 A-4

RT-86-1226. Lic. Jorge Hernández Ramírez, Director of the Comprehensive Insurance Department of the National Insurance Institute, duly commissioned and qualified for this act, as shown in the Public Register of Commerce Vol. 351, Folio 37, Entry 3, certifies: THAT having checked the records of the Department of Occupational Hazards, accidents have been reported which were suffered by the following persons while they worked for Standard Fruit Company.

Name	Claim Date	Disability Percentage
Castro Alfaro Domingo	5/27/81	20%
Campos Alpízar Ismail	6/27/80	15%
Morera Alvarado Ovidio	6/17/83	20%
Morera Alvarez Alvaro	1/15/78	3%
Hernández Badilla Jesús	2/ 5/81	20%
Herra Barboza Efraín	6/17/86	20%
Salazar Carballo Claudio	3/26/82	20%
Vázquez Carrillo Jorge	4/13/81	20%
Dinarte Castro Joel	7/16/80	15%
Zamora Castro Sergio	12/18/81	20%
Nuñez Céspedes Alcibiades	5/11/83	20%
Sánchez Oses Mario	3/26/85	15%
Pérez Espinoza Gregorio	4/21/81	20%
Arias Fallas Francisco	2/14/80	20%
Garita Garita Rigaberto	2/16/78	20%
Gómez Gómez Manuel	10/15/81	20%

Morera González Francisco	3/10/81	20%
Vega Granados Andrés	6/ 9/80	20%
Bermúdez Herneández Alfredo, k.e.: Hernández Vergas Alfredo	9/10/80	10%
Figueroa Matarrita Juan	12/ 9/80	15%
Núñez Moye Uriel	2/10/81	20%
Cartín Araya Olger	7/22/85	20%

PAGE 2

[RT-R6-1226, page 2]		
Salas Núñez Ismael	10/17/86	20%
Vega Pérez Jorge	7/ 1/80	20%
Ramírez Ramírez Francisco	1/14/81	20%
Guevara Reyes Vicente	4/20/81	20%
Espinoza Rodríguez Gerardo	4/ 7/81	20%
Zumbado Sales Daniel	8/ 1/80	10%
Zumbado Salas Mario	7/ 7/81	20%
Morales Salzar Rubén	1/ 8/85	20%
Sibaja Soto José	7/ 7/81	20%
Elizondo Umaña Elei	5/21/80	40%
Flores Valverde Vicente Manuel	5/21/80	40%

That the above mentioned workers received compensation in accordance with the criteria of our Department of Health Services for Azoospermia. Given in San José, Costa Rica, at the request of Shell Chemical Company, a Division of Shell Oil Company, on August the nineteenth of the year one thousand nine hundred and eighty six

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Prepared by: MTDES (Signature)
Revised by: GBA (Signature)

AUTHENTIC: SIGNED AND SEALED
Lic. Roberto Zaldívar
Attorney and Notary

SEALED: BAR ASSOCIATION
REPUBLIC OF COSTA RICA

I CERTIFY that the signature above is that of Licenciado Roberto Zaldívar Gómez, as recorded in Folio 2539 of Volume VIII of the Roster of Attorneys registered as members of this Association for the practice of that profession of Attorney. San José, 16 September 1986.

This certification involves no responsibility as to the document's content. IT IS PART OF THE DOCUMENT WHEREIN THE ATTORNEY'S SIGNATURE WHICH IT VALIDATES IS CONTAINED.

SIGNED: (Signature illegible)
Secretary

[OBVERSE OF PRECEDING CERTIFICATION]

Republic of Costa Rica
Department of Foreign Relations and Religious Affairs

The above signature, of Mr. Hernán Vega M., Vice-President of the Bar Association, is authentic.

San José, 19 September 1986

This certification involves no responsibility as to the document's content.

SIGNED: Ms. Ileana Duran
Ileana Duran Barquero,
Certification Officer

SUPPLEMENTAL APPENDIX 8

Affidavit Of Jane M. Gootee

Dated April 15, 1987

[Transcript pp. 712-719]

STATE OF MICHIGAN)
) SS.
COUNTY OF MIDLAND)

AFFIDAVIT

I, JANE M. GOOTEE, declare as follows:

I am an attorney at law and have been a member of the Legal Department of The Dow Chemical Company ("Dow") since 1979. I was the attorney responsible for all claims and lawsuits involving the chemical 1, 2-dibromo-3-chloropropane ("DBCP") brought against The Dow Chemical Company up to January 1, 1987.

As an attorney at Dow, my duties have included the supervision of defense efforts on behalf of Dow in certain litigation involving DBCP. I have become familiar with the issues, evidence and witnesses which are critical to a proper defense of a lawsuit wherein personal injuries have been claimed as a result of DBCP exposure.

The literature on DBCP establishes that its toxicity follows a dose/response curve as do all toxins. That is, the degree of harm resulting from exposure to DBCP, if any, is proportional to the dose. My experience in other DBCP litigation establishes that it is necessary to ascertain all facts surrounding the circumstances of exposure in order to secure expert opinion concerning the response that one would expect. This would include the amount of

DBCP to which one is exposed, the length of exposure, the frequency of exposure, [and the route, that is, whether by ingestion, inhalation or dermal contact.

In order to defend itself in this action, Dow would have to develop evidence respecting each individual's exposure which would come exclusively from Costa Rican witnesses including the plaintiffs, their co-workers and supervisors and their employment records. Undoubtedly, other Costa Rican witnesses such as employees of other employers present at the banana plantations would also have direct eyewitness knowledge of the dose, length of exposure, frequency of exposure and exposure route.

Dow would attempt to show as part of its defense to this action that its labels, in English and Spanish, adequately warned of the dangers of DBCP through all routes of exposure, ingestion, inhalation and dermal contact. Costa Rican witnesses would have to establish whether each plaintiff and/or their employers read and understood the labels. If the plaintiffs read the labels, were they allowed to work in such a manner as to comply with label warnings? If the plaintiffs are illiterate, were the label instructions read and followed by their supervisors and/or co-workers?

DBCP was distributed to many areas of the United States for many years in much greater quantities than ever used in Costa Rica. There has been no evidence of widespread health problems among American agricultural workers and DBCP obviously was used on a

regular basis in this country without]* adverse health affects [sic]. A number of lawsuits have been brought by DBCP factory workers, but only two have been brought claiming injury from agricultural work with DBCP. If, in fact, a number of Costa Rican workers had adverse affects in the agricultural use of DBCP, this would undoubtedly be due to differences between agricultural practices in the United States and those in Costa Rica. In order to defend itself, Dow would have to investigate thoroughly through Costa Rican witnesses the agricultural practices followed in the banana plantations where the plaintiffs were employed. Differences in occupational hygiene practices, the reasons therefore, and whether Dow is arguably responsible for these would form a major part of Dow's defense efforts. All of the evidence relating to agricultural practices and occupational hygiene would be located in Costa Rica and would be established through Costa Rican witnesses and documentary evidence.

In the United States, DBCP was often applied by persons other than the farmer or the farmer's employees. This also may have been the case in Costa Rica. Dow would have to develop evidence relating to these third-party applicators. If the third-party applicators conducted themselves negligently and failed to comply with label instructions, they would be potential third-party defendants and Dow should have the right to cross-complain against them. For instance, if a third-party applicator used too much DBCP and allowed the plaintiff plantation

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* This portion of Ms. Gootee's affidavit, which was page two of the original affidavit, was submitted to the trial court but does not appear in the official transcript on appeal.

workers to enter the fields when the exposure to DBCP was likely, this could provide the causal link for any injury.

Dow had no control over the methods and manner of application in Costa Rica. Whether DBCP was applied in a manner, or improperly so as to expose the workers to substantial amounts of the chemical, is dependent on the activity of Costa Ricans and evidence relating thereto is to be found in Costa Rica. For instance, in the United States DBCP was generally applied through irrigation water or a chisel implement that was towed behind a tractor. It is my understanding that another method involving a hand-held injector device was used often in Costa Rica.

In order to defend itself, Dow would have to pursue Costa Rican witnesses who could explain the design, manufacture, development and use of this injector device. Dow would want to know not only how the injector device was designed to work, but also how it actually performed in practice. Dow would seek information, through Costa Rican workers, as to whether the device, as designed, would adequately protect the worker from inhalation, ingestion and dermal exposure. Even if designed properly, Dow would seek by way of defense to develop whether the device when used in practice adequately protected the worker. This would include investigation into how the device was calibrated, whether the devices wore out and leaked, and whether the device allowed DBCP vapors to be breathed by the worker or DBCP liquid to contact the skin. All of this investigation into the use and performance of the injector devices would be through Costa Rican witnesses and documents.

To the extent that the devices as designed or as maintained and operated in the field improperly exposed workers to DBCP, Dow would seek to cross-complain against the third-party designers, sellers, and maintainers of the devices. Most, if not all of these third-parties would likely be Costa Rican.

Dow does not know whether its DBCP products were actually used or repackaged in Costa Rica, or the amount, if any, of use or repackaging. If they were, a question of the adequacy of the labels on the new package would obviously involve investigation in Costa Rica and if a Costa Rican entity or person were found to have improperly labelled the repackaged product, Dow would seek to cross-complain against these parties also.

Assuming that there was exposure to DBCP, the fact of injury and cause thereof are very complicated issues which require testimony by many witnesses and investigation into many documents. In this case, those witnesses and documents would be located in Costa Rica.

There is evidence that the workers at United States industrial plants where DBCP was manufactured and formulated and who had substantial and continuous exposure to the material, experienced fertility problems. However, litigation involving these industrial workers has established that diagnosis and causation in these cases are complex issues.

Assuming that these plaintiffs are claiming fertility problems, the fact that children are not forthcoming in a particular marriage is only the beginning of an appropriate inquiry. In fact, many couples cannot have children but only a minute fraction of fertility problems can be

traced to DBCP. Many other factors can explain a childless marriage.

Claims of infertility by these plaintiffs would involve a multi-step process to establish whether the cause of a childless marriage is infertility on the part of the husband, whether this infertility is due to germinal cell aplasia, the condition which DBCP can cause, and whether in a particular case the germinal cell aplasia is due to DBCP or other factors. Costa Rican witnesses and documents would be involved at each step of this inquiry.

The first question is whether a childless marriage is due to a low sperm count in the husband's ejaculate. This question is answered through a laboratory semen analysis. Since levels of sperm vary in any individual from time to time, in order to establish the fact of oligospermia (low sperm count) or azoospermia (zero sperm), successive semen analysis must be properly and carefully performed.

The confirmation of oligospermia or azoospermia itself, however, does not establish the condition which DBCP is implicated as causing. That condition, germinal cell aplasia, is described as a lowered number or complete lack of germinal cells within the testis itself. The majority of oligospermia or azoospermia cases are not caused by germinal cell aplasia: but rather, are caused by some sort of blockage between the testis and the external environment. In order to establish that the patient actually has germinal cell aplasia, rather than the much more common blockage that accounts for a low sperm count, it is necessary to perform a testicular biopsy.

Even if a testicular biopsy confirms the condition of germinal cell aplasia, however, a diagnosis of cause cannot be made unless and until further investigation is completed. This investigation would include a complete history of the patient's medical and social history to determine whether other conditions such as radiation or venereal disease could account for the germinal cell aplasia. In addition, a causal diagnosis would include the monitoring of certain hormone levels in the patient including testosterone, follicle stimulating hormone (FSH), and leutenizing hormone (LH). The literature has indicated that when someone is exposed to sufficient DBCP to affect fertility, the levels of testosterone, FSH, and LH, are also affected in a particular manner and with given patterns.

Thus, in order to determine the fact of injury and the question of causation, Dow will seek to discover through witnesses and documents all of the facts in this multi-step analysis. My experience in other DBCP cases indicates that no single person can establish all of these steps alone and no set of documents covers all of these issues. Rather, it is necessary, in order to determine diagnosis and cause, to obtain the testimony of numerous doctors, pathologists, and technicians as well as, often, the plaintiff's wife, her physicians and, often, friends and acquaintances. All of these doctors, pathologists, technicians, wives, friends and acquaintances, will be located in Costa Rica, as will all the relevant documents.

In addition to evidence specifically related to the plaintiffs in this action, Dow will seek to discover information relating to other workers on Costa Rican banana plantations and the effect, if any, of DBCP exposure on

them. As established in the Declaration of Alberto Raven R., employers in Costa Rica must insure their workers against occupational hazards through the National Institute of Insurance (INS). It is my understanding that the INS has substantial work on the effect of DBCP on banana plantation workers in Costa Rica. I am led to believe that the INS had gathered substantial information with respect to numerous workers. In order to establish the affect of DBCP on banana workers in the Costa Rican experience, Dow will seek to discover from the INS the documentation that has been gathered.

It has been my experience in defending DBCP cases that the greatest concentration of evidence most critical to the questions of injury, diagnosis, cause and fault, has always been centered at the situs of the injury where the alleged exposure took place, where the injury was identified and diagnosed, and where the cause was established. In this case, that situs would be Costa Rica and that is where most of the evidence relevant to these cases will be found.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 1987 at Midland, Michigan.

/s/ Jane M. Gootee
JANE M. GOOTEE

Subscribed to and sworn to before me this 15th day of April, 1987.

/s/ Kristine Ann Buch
KRISTINE ANN BUCH,
Notary Public
Midland County, Michigan
My Commission Expires:
8-16-88